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NO. 83-322

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

CLARENCE COLE, ET AL.,
*Petitioners,*

v.

STATE OF GEORGIA,
*Respondent.*

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

## BRIEF IN OPPOSITION FOR THE RESPONDENT

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## QUESTIONS PRESENTED

1.

Whether the trial court properly ordered the courtroom closed during the hearing on the motion to suppress.

2.

Whether the Supreme Court of Georgia properly concluded that O.C.G.A. § 16-14-7(f); Ga. Code Ann. § 26-3502(d)(2) is constitutional on its face.

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## PART ONE

## STATEMENT OF THE CASE

Petitioners, Clarence Cole, W. B. Burke, Eula Burke and Archie Thompson, were was indicted along with numerous others on February 9, 1982, by the Grand Jury of Fulton County on charges of violation of the Georgia Racketeer

Influenced and Corrupt Organizations Act. All defendants entered pleas of not guilty. A trial was begun on June 21, 1982 for the Petitioners and others. At the conclusion of the trial, Petitioners were found guilty of commercial gambling and communicating gambling information. Petitioner Eula Burke was sentenced to five years probation, a $10,000 fine and twelve months probation on another charge. (R. 201, 209-210). Petitioner W. B. Burke was sentenced to five years with two years to serve, a $15,000 fine and twelve months probation on another charge. Petitioner Cole was sentenced to five years with three years to serve and twelve months on another charge. Petitioner Thompson was sentenced to five years with two years to serve, a

$10,000 fine and twelve months probation on another charge.

The facts in the case show that between June, 1981, and January, 1982, the various defendants participated in a gambling organization which conducted a lottery based on the daily stock and bond volume on the New York Stock Exchange. This "lottery" was conducted in the metropolitan Atlanta area. Gambling information was transmitted by way of electronic means and stored in a microcomputer maintained by Defendant Clarence Cole.

Prior to trial, a hearing was held on the motion to suppress. The state filed a motion on June 14, 1982, to close the hearings to the public. In making this motion, the state asserted that the hearing was going to involve evidence of a sensitive nature. The

litigation on the motion would of necessity involve the introduction of evidence which would affect other individuals not on trial at that time and individuals not indicted at this time. A portion of this information involved certain wire tap evidence. Under O.C.G.A. § 16-11-64(a)(8); Ga. Code Ann. § 26-3004(k), "Any publication of the information or evidence obtained under a warrant issued hereunder other than that necessary and essential to the preparation of and actual prosecution of the crime specified in the warrant shall be an unlawful invasion of privacy under this part and shall cause such evidence and information to be admissible in any criminal prosecution." Therefore, in order to allow the state to utilize the same

information in subsequent prosecutions against other individuals, the state sought to close this portion of the moton hearing so as not to taint the evidence and preclude subsequent use against individuals not then on trial. The court concluded that if the evidence was going to be offered at the trials of other offenders, the presentation of the evidence at the hearing on the motion to suppress would amount to publication and would taint the evidence. (M.T. 6-8).

Attorney Charles Smith agreed with the observation made by the state and concurred with the request, particularly insofar as the motions were concerned. He did not concur as to the trial. Attorney Herbert Shafer opposed the closure and asserted that

he would insist on the constitutional right to an open trial. (M.T. 11).

Subsequently, the court granted the motion to close the proceedings as to the hearing on the motion to suppress. Attorney Shafer sought to have some people remain in the courtroom, but the trial court ruled that the statute was very specific, "And I think that means everybody must go except the defendants, counsel, necessary witnesses of course who appear and the officers of the court." (M.T. 14). Attorney Smith further interposed an objection to Attorney Shafer's wife remaining in the courtroom. The court granted the motion to close the proceedings and excluded all individuals except those enumerated by the court.

After the trial and convictions, the Petitioners and the other defendants filed a direct appeal to the Supreme Court of Georgia challenging, among other things, the closure of the courtroom and the constitutionality of O.C.G.A. § 16-14-7(f); Ga. Code Ann. § 26-3405(d)(2). That court affirmed the conviction and sentences and concluded that the particular code section was constitutional on its face and did not violate the Fourth Amendment. The court also concluded that the statute was not unconstitutional as applied in this case. In reviewing the issue of closure, the court concluded that the trial court balanced the rights to a public hearing against the privacy rights of others and closed the

hearing. Under those principles, the court concluded that the Sixth Amendment right to a public trial was not violated. Waller, et al. v. State, 251 Ga. 124, ____ S.E.2d ____, 1983). (See Petitioners' Appendix A). The motion for rehearing was denied by that court on June 18, 1983. The instant petition for a writ of certiorari was then filed in this Court.

## PART TWO

## REASONS FOR NOT GRANTING THE WRIT

### A. THE TRIAL COURT PROPERLY RULED TO CLOSE THE HEARING ON THE MOTION TO SUPPRESS PRIOR TO TRIAL.

Petitioners present as the first issue before this Court a challenge to the trial court's closure of the courtroom during the hearing on the motion to suppress. Petitioners have asserted that this closure violated his right to a public trial under the Sixth Amendment.

At the beginning of the hearing on the motion to suppress, the state reasserted the formal motion for closure because it would be necessary during the hearing on the motion to utilize evidence which could involve a

reasonable expectation of privacy of persons who were not presently on trial. This motion was made based on the provisions in O.C.G.A. § 16-11-64(a)(8); Ga. Code Ann. § 26-3004(k) addressing publication of wire tap information and subsequent use of that information in other prosecutions. The Supreme Court of Georgia addressed this issue and found the following:

> In the hearing here, information was revealed which was potentially harmful to others, would tend to violate the privacy of others and might prejudice other potential defendants. Under these circumstances, the court balanced appellants' rights to a public hearing on the motion against the

privacy rights of others and closed the hearing.

Waller v. State, supra.

The Court noted that the trial court properly exercised its inherent power "to preserve order and decorum in the courtroom to protect the rights of parties and witnesses, and generally to further the administration of justice." Lowe v. State, 141 Ga. App. 433, 435, 233 S.E.2d 807 (1977). Under those circumstances, the Supreme Court of Georgia concluded that the Petitioners' Sixth Amendment right to a public trial was not violated.

The trial court was faced with a situation involving evidence secured during court-authorized electronic surveillance. The state had announced

its intention to and did play portions of this electronic surveillance during the motion hearing to establish probable cause. The trial court had the responsibility to protect privacy of the defendant and individuals not then on trial and those individuals not under indictment at that time. Due to the fact that the right of privacy is specifically recognized in the statute authorizing court-authorized electronic surveillance, the right of access and the right to a public trial may be legitimately limited under the narrow circumstances presented by the instant case. See United States v. Dorfman, 690 F.2d 1230 (7th Cir. 1982); Application of Kansas City Star, 666 F.2d 1168 (8th Cir. 1981).

Based on the particular circumstances in the instant case, Respondent submits that the trial court acted properly in closing the hearing on the motion to suppress to protect the privacy of other individuals not being tried at that time. In balancing the rights presented, the court properly exercised its discretion and did not violate the Petitioners' right to a public trial in the instant case. Therefore, Respondent submits that no federal constitutional issue is presented by this claim.

B. THE GEORGIA SUPREME COURT PROPERLY CONCLUDED THAT O.C.G.A. § 16-14-7(f); GA. CODE ANN. § 26-3405(d)(2) DOES NOT VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioners assert that O.C.G.A. § 16-14-7(f); Ga. Code Ann. § 26-3405(d)(2) violates the Fourth Amendment in that it allows unbridled discretion to police officers in executing a search and allegedly constitutes impermissible delegation of magisterial duty.

The statute in question is a subsection of the provisions for forfeiture of property under the Racketeer Influenced and Corrupt Organizations Act (Georgia RICO Act).

Under the section in question, various provisions are set forth for forfeiture proceedings. The statute specifically declares certain property be subject to forfeiture and sets out specific procedures for the forfeiture. The proceeding is one to which the Georgia Civil Practice Act applies. The particular subsection of the statute in question provides as follows:

> Seizure may be effected by a law enforcement officer authorized to enforce the penal laws of this state prior to the filing of the complaint and without a writ of seizure if the seizure is incident to a lawful arrest, search or inspection and the officer has probable cause to believe the

> property is subject to forfeiture and will be lost or destroyed if not seized. Within ten days of the date of seizure, the seizure shall be reported by the officer to the district attorney of the circuit in which the seizure is effected; and the district attorney shall, within thirty days of receiving notice of seizure, file a complaint for forfeiture. The complaint shall state in addition to the information acquired in subsection (e) of this Code section, the date and place of seizure.

O.C.G.A. § 16-14-7(f); Ga. Code Ann. § 26-3405(d)(2).

The Georgia Supreme Court considered the challenge to this

particular code section on its face and noted that a seizure under this section is allowed only in certain prescribed circumstances. The seizure must be pursuant to a lawful arrest, search or inspection and, further, the law enforcement officer must have probable cause to believe that the property is subject to forfeiture or the property will be lost or destroyed if not seized. As the statute specifically provides on its face that the search or inspection must be lawful, there is clearly a requirement that the search be made either pursuant to a warrant, incident to a lawful arrest, or under other exigent circumstances which would render the search or inspection lawful. Therefore, as noted by the Georgia Supreme Court, by definition the

statute complies with the Fourth Amendment. Waller v. State, supra.

The statute in question provides four conditions precedent to the seizure of property under this subsection. The first requirement is that the seizure be made by a law enforcement officer authorized to enforce the penal laws of this state. This requirement is clearly constitutional on its face.

The subsection secondly requires that the seizure be made incident to a lawful arrest, search or inspection. As noted by the Supreme Court of Georgia, the designation of the search or inspection as "lawful" is clearly in compliance with the Fourth Amendment to the United States Constitution.

In addition to these two requirements, the seizing officer must

also have probable cause to believe that the property is subject to forfeiture as provided in O.C.G.A. § 16-14-7(a); Ga. Code Ann. § 26-3405(8). In addition, officers would be authorized to seize other evidence which is in plain view at the time the search is executed. Those officers making an arrest are also allowed to search persons and their immediate presence for evidence without a warrant specifically listing those particular items. See New York v. Belton, 453 U.S. 454 (1981). Therefore, an officer who is executing a valid arrest warrant or a valid search warrant may seize contraband, evidence or weapons under the prescribed circumstances without these items necessarily being listed on the search warrant. Items subject to

forfeiture may be dealt with in a similar fashion. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

The fourth requirement set forth by the statute is that the officer have probable cause to believe that the property will be lost or destroyed if not seized. This is similar to the exigent circumstances requirement utilized in standard search and seizure situations. Exigent circumstances have been recognized in various settings, including the automobile exception created in Carroll v. United States, 267 U.S. 132 (1925) and subsequently followed in Chambers v. Maroney, 399 U.S. 42 (1970). Exigent circumstances have also been recognized in the "hot pursuit" exception set forth in Warden

v. Hayden, 387 U.S. 294 (1967) and the search incident for the arrest exception in Chimel v. California, 395 U.S. 752 (1964).

Respondent submits that as the four conditions precedent set forth in this subsection do not violate the Fourth Amendment to the United States Constitution, the code section in question is clearly constitutional on its face.

Petitioners have also asserted that the court should have suppressed all evidence seized rather than only that evidence which the court concluded had been improperly seized. This argument was made based on an assertion that this was a general search and everything seized should be suppressed pursuant to the exclusionary rule.

The Georgia Supreme Court noted that such items as were unlawfully seized were excluded from evidence pursuant to the motion to suppress. In Marron v. United States, 275 U.S. 192 (1927), cited by the Petitioners, it was concluded that a search warrant describing intoxicating liquors and articles for the manufacturer did not specifically authorize a seizure of a ledger and bills of account. The court went on to find, however, that the ledger and bills were seized incident to a lawful arrest.

In Kremen v. United States, 353 U.S. 346 (1956), there were no search warrants in existence. The search of the persons and the premises was made based on arrest warrants for only two of the persons present. Under those circumstances, it was concluded that

the evidence was not seized from persons for whom the officers had arrest warrants; therefore, the evidence was not legally seized.

The Petitioners' reasoning that all items and information seized pursuant to a valid search warrant should be excluded when the officers may have gone beyond the scope of the search warrant is not justified under the instant circumstances because it is clearly a deviation from the purposes intended to be served by the exclusionary rule. The purposes of the exclusionary rule and the intent of the Fourth Amendment are served by excluding evidence improperly seized, not by excluding evidence which was properly seized at the same time. Therefore, Respondent asserts that no such requirement should be

established. Furthermore, contrary to the assertions of the Petitioners, this did not deprive the Magistrate of the opportunity to exercise meaningful supervision and define the limits of the warrant. As evidence was excluded which was allegedly illegally seized, the question as to the Magistrate's supervision is simply not presented.

Therefore, Respondent submits that the code section attacked in the instant petition does not violate the Fourth Amendment either on its face or as applied to the Petitioners in the instant case. Therefore, no federal constitutional question is presented for review by this Court.

## CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court deny the petition for a writ of certiorari filed on behalf of the Petitioners.

Respectfully submitted,

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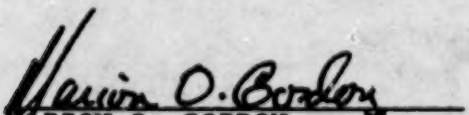

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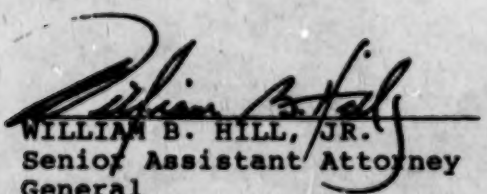

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## CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioners by depositing three copies of same in the United States mail with proper address and adequate postage thereto to:

Charles R. Smith
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This 11th day of October, 1983.

/s/
MARY BETH WESTMORELAND